IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

O R D E R

S.B. CRIMINAL REVISION PETITION NO. 92/2007

PINKY @ KRISHAN GOPAL Vs. STATE OF RAJASTHAN

DATE: 11.04.2007.

HON'BLE MR. K.S. RATHORE, J.

Mr. D.G. Chaturvedi for the accused-petitioners.
Mr. B.S. Chhaba, Public Prosecutor for the State.
Mr. H.S. Bikarwar for the complainant.

****

The present criminal revision petition under Section 397 r/w Section 401 Cr.P.C. is preferred by the accused-petitioner against the judgment dated 23.01.2007 passed by the Additional Sessions Judge No.2, Bharatpur in Criminal Appeal No. 73/2006, by which the conviction order of the accused-petitioner passed by the Additional Chief Judicial Magistrate No.2, Bharatpur vide judgment dated 01.11.99 in Criminal Case No. 771/96 for the offence under Section 377 IPC has been confirmed but the sentence of 4 years R.I. awarded to the accused-petitioner has been reduced to R.I. for 2-1/2 years.

In brief the facts of the case are that Shri Ram Prasad lodged a written report at P.S. Mathura Gate, Bharatpur on 09.12.96 at 4.30 p.m. About the incident alleged to have taken placed on 04.12.96 at

4.00 p.m. in the evening. On receipt of the above report, FIR No. 628/96 for the offence under Section 377 IPC was registered and investigation commenced. During the course of investigation the accused-petitioner was arrested and after completion of investigation police submitted the charge-sheet. The prosecution examined as many as 6 witnesses. The accused-petitioner was examined under Section 313 Cr.P.C. and produced one witness namely Amar Chand in support of plea that on account of enmity, false case has been registered against the accused-petitioner.

The trial Court after hearing the rival submissions of the respective parties, vide judgment dated 01.11.99 convicted the accused-petitioner for the offence under Section 377 IPC and sentenced to undergo R.I. for 4 years and a fine of Rs. 5,000/-, in default of payment of fine to further undergo S.I. for one month. The said amount of fine of Rs. 5,000/- was ordered to be given to complainant Ramprakash as compensation.

Aggrieving and dissatisfying with the said judgment of the trial Court dated 01.11.99, the accused-petitioner preferred an appeal before the Sessions Judge, Bharatpur. The Additional Sessions Judge No.2, Bharatpur vide its judgment dated 23.01.2007, while partly allowing the appeal, confirmed

the conviction of the accused-petitioner under Section 377 IPC, but reduced the sentenced of R.I. for 4 years as awarded by the trial Court to R.I. for 2-1/2 years with fine of Rs. 5,000/-, in default of payment of fine to further undergo S.I. for one month.

Learned counsel for the accused-petitioner has challenged the said judgment of the Appellate Court dated 23.01.2007 on the ground that Vipin was medically examined on 09.12.96 at 5.15 p.m. by Dr. B.L. Meena (PW5), who prepared M.L.R. (Ex.P4). The doctor reserved his opinion regarding carnal intercourse till receipt of chemical examination report of vaginal smear and vaginal swab preserved for chemical examination. The doctor did not state that injuries on the anus was due to carnal intercourse. Even the allegation of carnal intercourse was not corroborated.

It is further submitted that there was no substantive evidence to prove carnal intercourse. The substantive evidence regarding carnal intercourse could have been of Dr. Govind Gupta under whom Vipin was under treatment from 04.12.96 to 09.12.96, but Dr. Govind Gupta has not been produced by the prosecution. It is also alleged that important fact of identification is conspicuously missing in the FIR which was very material in the case of alleged carnal intercourse and the fact of not mentioning the

identification of the accused in the FIR is fatal to the prosecution. He referred the statement of Vipin (PW2). It is also alleged that there was no independent evidence to prove carnal intercourse. The accused-petitioner was not seen in the company of the victim on the day and time of the occurrence. There was no identification of the accused-petitioner.

In support of his submissions, the learned counsel for the accused-petitioner placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Orsu Venkat Rao Vs. State of Andhra Pradesh, reported in 2004(4) Crimes 197 (SC),** wherein the Hon'ble Supreme Court has held that question whether it was safe to act on evidence of two child witnesses- Evidence and circumstances showed that prosecution suppressed the earlier version of two child witness- Account of incident given by these witnesses also revealed that it was against natural course of conduct and probabilities- Evidence of these witnesses could not be said inspiring confidence- Earlier version of other witnesses who had arrived on the spot on hearing hue and cry of children seemed to have been suppressed- Conviction could not be sustained.

Here in the instant case, the child has identified the accused and specifically alleged regarding offence under Section 377 IPC and the facts

and circumstances before the Hon'ble Supreme Court were altogether different and the witness of the child is crucial evidence and the child has specifically levelled allegations against the accused-petitioner, which has been corroborated by the evidence of the other witnesses.

It is further alleged by the petitioner that application of mind has not been applied by both the Courts below while passing the impugned conviction order against the petitioner and placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Paul George Vs. State, reported in 2002 R.C.C. (SC) 154,** wherein it has been held by the Hon'ble Supreme Court that the order disposing a matter must indicate application of mind, and some reasons be assigned for negating or accepting pleas raised by the petitioners/appellants. In the order passed by the High Court and impugned before this Court there is complete absence of any such indication- Case remanded to consider the matter afresh and pass appropriate order in accordance with law.

Applying the ratio decided by the Hon'ble Supreme Court in the instant case as both the Courts below after applying mind and after appreciating the evidence of the witnesses, medical report and other material available on the record, have given concurrent

finding that the offence under Section 377 IPC is fully proved and established against the accused-petitioner.

Further although the Appellate Court has upheld the conviction of the accused-petitioner under Section 377 IPC but after thoroughly considering each and every aspect and in the facts and circumstances of the case, reduced the sentence of 4 years' R.I. as awarded by the trial Court to R.I. for 2-1/2 years. In such circumstances, it is wrong to say that the Courts below have not applied their mind while passing the impugned order of conviction against the accused-petitioner.

Learned counsel for the petitioner further submits that the witness of the child suffers from serious infirmity, therefore, the statement of the child should not be taken into consideration and in support of his submissions he placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Bhagwan Singh & Ors. Vs. State of M.P., reported in 2003(2) Crimes 82 (SC),** wherein the Hon'ble Supreme Court has held that in our considered opinion the evidence of the child witness suffers from serious infirmity due to omission of the prosecution in not holding test identification parade and not examining Agyaram to whom as alleged, the child first met after the incident.

Here in the instant case, the child aged about 3 years and 6 months has identified the accused-petitioner and also indicate the offence very well and no material infirmity is found so far as witness of the child in the instant case is concerned and the witness of the child itself is sufficient to prove the guilty against the accused-petitioner.

Having heard the submissions advanced on behalf of the accused-petitioner, learned Public Prosecutor and upon careful perusal of the judgments passed by both the Courts below as also the relevant record, as both the Courts below have given concurrent findings after minutely appreciating the evidence and the witnesses as well as the material available on record, therefore, it is not a case where any interference is required and this Court while exercising revisionary powers, cannot re-appreciate the evidence which has already been thoroughly appreciated by both the Courts below as stated herein above. The sentence of R.I. for 4 years as awarded to the accused-petitioner by the trial Court vide its judgment dated 01.11.99 has been reduced by the Appellate Court to R.I. for 2-1/2 years vide its judgment dated 23.01.2007 and thus, substantial relief has already been granted to the accused-petitioner by the Appellate Court looking to the heinous offence committed by the

accused-petitioner.

In view of these facts and circumstances of the case and as observed herein above, no case for any interference by this Court is made out and the impugned judgment dated 23.01.2007 passed by the Additional Sessions Judge No.2, Bharatpur is upheld.

Consequently, the revision petition fails and the same is hereby dismissed.

Record be sent back forthwith.

(K.S. RATHORE),J.

/KKC/